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AUSTRALIAN TRADITIONAL MEDICINE SOCIETY

Submission to Australian Health Ministers' Advisory Council

Options for regulation of unregistered health practitioners

The Australian Traditional Medicine Society is pleased to provide this submission to Australian Health Minister's Advisory Council discussion paper on current regulatory practices applied to unregistered health practitioners, the extent to which such measures are desirable in a uniform sense across all States and Territories and the methods for establishment and terms of such regulation.

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About The Australian Traditional-Medicine Society:

The Australian Traditional-Medicine Society (ATMS) is Australia's leading Association of natural medicine practitioners. With over 11,100 financial members, ATMS represents about 65% of all natural medicine practitioners in Australia. Traditional Medicine is increasingly popular amongst Australians with more than 70 per cent of Australians using a form of Natural Medicine as a regular part of their overall health care. Natural Medicine practitioners conduct some 2,000,000 professional consultations annually, making Natural Medicine a key and growing part of the Australian health industry.

Practice streams within ATMS include massage therapists, acupuncturists, clinical hypnotherapists, counsellors, herbalists, homeopaths, kinesiologists, naturopaths and nutritionists. ATMS promotes and represents professional practitioners of natural medicine, who are encouraged to pursue the highest ideals of professionalism in their natural medicine education and practice.

All ATMS members must abide by the ATMS Code of Conduct and official ATMS Policies. Furthermore, there is a process whereby concerns about the professional conduct of an ATMS member may be made to the ATMS Complaints Committee.

About This Submission

ATMS welcomes this opportunity to contribute to the worthwhile goal of providing additional public protection measures to patients and clients who receive health care services from practitioners not registered under the current National Registration and Accreditation Scheme for Health Professions. Obviously, there is a gap wherein numerous fields of health practice remain solely self regulated. The required additional protection for the public however may be possible by the adoption of key proposals in the AHMAC Consultation Paper and some further measures which ATMS is pleased to advocate.

ATMS is pleased that, from the options presented within the AHMAC Consultation Paper, the proposals to Government would likely serve to broaden and bolster legislative and regulatory avenues to prohibit untrained persons falsely claiming a professional title and thus creating a reputational risk for the Society's discrete practice areas and, more seriously, exposing patients to risk. Moreover, ATMS supports measures which may sharpen the avenues available to clients who may have legitimate grievances with care providers across the spectrum of presently unregistered health practitioners.

To this point, it is the view of ATMS that, particularly in reference to other identified areas of presently unregulated practice within the AHMAC Consultation Paper, modalities of practice represented by the ATMS are among the least invasive, best trained and most accountable to existing professional Codes of Conduct and professional standards frameworks. This is especially so when compared with others within the areas of practice as illustrated.

ATMS supports the AHMAC process and strongly believes that bogus practitioners and rogues practising outside the present self-regulatory system increase risk. Properly trained practitioners who practise inside their scope and within the ambit of an association do reduce this risk; however the support of a form of government regulation would give greater confidence to consumers and brand protection to practitioners.

Section 2 - Scope

If you are a professional association, can you provide an estimate of the number of unregistered health practitioners you believe to be practising in your profession or field.

As defined by the AHMAC paper, ATMS membership represents presently unregulated practitioners. Currently, the membership of the Society stands at 11,413 with the total industry estimated to tally 15,000 practitioners.

Section 4 – The Problem

What do you think are the risks associated with the provision of health services by unregistered health practitioners?

ATMS concurs with the analysis made in the AHMAC Consultation Paper on this issue. However, as ATMS represent a higher and more accountable standard of care, the presence in the marketplace of rogue and unqualified practitioners presents a strong risk.

ATMS is therefore of the view that, whilst Government should not necessarily be the gatekeeper to professional entry, both Government and associations such as the ATMS should work in partnership to safeguard both the integrity of practice modalities, the health system more broadly and obviously the community, from rogue and unqualified practitioners.

To what extent have the risks associated with these activities been realised in practice?

ATMS accredited practitioners represent a diffuse range of natural medicine modalities and thus, the risk profiles for each will be inherently different. At a macro level, it is fair to say that the de-medicalised modes of care may create a perception among patients and clients of practitioners that “this is natural, therefore it is safe”. This overly simplistic line of reasoning certainly is not something that either practitioners or ATMS believe to be true. In addition, professional associations such as ATMS have stringent guidelines for accredited members and provide strong training processes and professional development as part of the accreditation process, thereby lessening any risk attributable to the qualified and professionally/socially responsible practitioner.

Of the risks inherent across some of the practice streams identified as currently unregistered in the AHMAC Consultation Paper, ATMS believes that firstly, its accredited practitioners face a significantly lower risk profile to patients and clients than some (e.g. prosthetists, phlebotomists, dental technicians among others) and secondly that the ATMS Code of Conduct clearly articulates the principles which are acceptable to the ATMS, the broader profession and the larger community.

Do you know of instances of actual harm or injury?

ATMS is aware of isolated instances, consistent with those identified in the AHMAC Consultation Paper. The key features are, however, that although these are serious matters requiring attention, they are isolated and largely confined to the rogue practitioner. It is this area of the rogue practitioner which requires the attention of Government and regulation. ATMS reiterates its key philosophy that natural medicine practice is founded on the development of a therapeutic relationship and the implementation of therapeutic strategies based on holistic principles.

Specifically, although traditional medicines are a legitimate arm of health care and well patronised by more than 70% of Australians, some medical complaints need the combined care of natural medicines AND conventional western medicine. Additionally, as a stream of health care, ATMS believes it is wholly appropriate for a form of regulatory oversight to exist in tandem with practice-specific guidelines.

What evidence is available on the nature, frequency and severity of risks?

From 2009-10, ATMS Complaints Committee met on six occasions and processed 26 complaints. From this data, the risk profile largely centres on matters of professional conduct and whilst six complaints were upheld and financial and professional sanctions imposed, the remainder were proved to be unsubstantiated and, in one instance, an amicably negotiated settlement was reached. A further category of risk relates to financial conduct wherein two members were expelled from the Society for inappropriate health fund activity. Finally, three complaints of sexual misconduct were examined resulting in two expulsions from the Society and one indefinite suspension.

Since 2005-06, the Society has heard less than 94 complaints and, within these, only 56 were found to be of substance and less had substantive sanctions imposed owing to the subjective nature of certain complaints.

What factors increase or reduce the risk that individuals will suffer harm as a result of the activities of unregistered health practitioners?

ATMS believe that strong education processes and a focus on ongoing development through compulsory skills seminars act to reduce risk. Further to associated professional development and education, the removal of access to certain medications that have been restricted due to noted side effects, such as Schedule 1 herbs. To this point, some Herbalists and Naturopaths wish to have a regulatory regime in place which would provide access to these herbs. ATMS rejects this position as it is an inevitable corollary that the increased prevalence of these herbs would increase risk.

More generally, ATMS believe that as a principle, rogue and unqualified practitioners increase the risk profile within this sector; whereas professionally trained practitioners, compliant with a genuine professional association set of rules and guidelines greatly reduce risk.

Section 5 – The Objectives of Government Action

What do you think should be the objectives of government action in this area?

ATMS strongly believe that the Government has a clear role to play in setting some regulatory boundaries within which all levels of societal interaction should be undertaken. Obviously, this has some profoundly beneficial impacts to the community and health care providers to enable the greatest degree of baseline confidence between provider and consumer. This has a secondary significance inasmuch that the prudent application of regulation also provides a clear and universal understanding of certain terms relevant to the industry. Through a sensible regulatory framework, the government can also provide a transparent and unbiased safety net for consumers, as well as a degree of comfort for practitioners, in the rare instances of negative experiences needing to be investigated and / or punished, knowing that a thorough process possibly resulting in serious sanctions does apply.

These principles should certainly underpin any form of government action within this area and ATMS supports any sensible measures. That said, ATMS emphatically believes that the government should simply set some 'flags to swim between' but allow peak bodies such as ATMS to determine standards for admission to the profession. In line with this though, ATMS would strongly advocate the need for the Federal government to work with its State and Territory partners to establish a high-level principle of probity checks to be administered by official channels in partnership with professional associations. Moreover, ATMS holds the view that there should be an additional level of authentication by the Government to test any professional association's bona fides.

ATMS believe the broad model for the regulation should be a Code empowered by an appropriate Federal instrument to be developed in consultation with professional associations but principally enforced and administered by the currently adequately resourced State and Territory jurisdictions who report to a National Register.

Section 6 – The Options

Do you think there is a case for further regulatory action by governments in this area?

ATMS concurs with the analysis undertaken in the AHMAC paper and believes the best case involves a form of negative licensing for practitioners and a complementary model for associations to leverage this regulation to improve professional standards of accreditation.

What do you think of the various options?

Option 1: No change

ATMS rejects this position utterly. Change to the existing laissez fair approach is required for optimal public confidence and indeed safety.

Option 2: A voluntary Code of practice for unregistered health practitioners

ATMS does not endorse this position. Such an ad-hoc process will inevitably lead to confusion, anomalies and possible other deleterious effects such as jurisdiction-shopping in the event of a dispute or withdrawal from professional accreditation processes. More significantly, ATMS believes this position fails to provide, in a clear and transparent way, sufficient authority to Government for consumers and practitioners to engage with confidence.

Option 3: A national statutory Code of conduct for unregistered health practitioners

ATMS strongly supports this position as it provides a clear and consistent minimum standard for all practitioners. Additionally, this clearly vests authority in the Government and thus gives consumers and practitioners confidence that the considerable resources of Government can be brought to bear to address serious concerns. A national, statutory Code of conduct provides consistent and unambiguous standards and merits the support of practitioners and organisations currently unregulated.

On balance, do you have a preferred option? What are your reasons?

ATMS endorses the position advocated in option three, but would add that to fully realise the intention of regulation – being to ensure risk to patients and clients is reduced – the Government could augment this model to further drive confidence amongst consumers and make more robust any necessary reactive measures.

ATMS proposes a mode of probity checking of practitioners prior to accreditation being granted, or renewed in the case of existing practitioners. This may be achieved through enshrining in the Code a requirement that a health service provider must belong to a professional association, using the existing *Private Health Insurance (Accreditation) Rules 2008* as a suitable model and also thereby ensuring consistency with other areas of health care across industries and practice modalities.

Such a model would further be strengthened through government establishment of a nationally accessible complaints decision register to be established and maintained by Government. At a practical level, this could function such that the high-level regulatory settings are established by the Commonwealth, with enforcement to be conducted by the States and Territories who already have established resources for this purpose.

What do you think are the costs and benefits of the three options?

Obviously, Options One and Two attract no cost to Government however it is apparent that there is no benefit derived by Government or the Community by these models should there be an incident that warrants investigation and some application of a disciplinary process. Certainly this is the truest for Option One; however Option Two in essence relies upon the personal integrity of an investigated practitioner to comply with the processes of their member association. Should they simply lapse their membership, it is likely to be the case that there is insufficient rigour in the model to follow through an investigation thoroughly or enforce a sanction if required.

Therefore, the ATMS holds that the statutory Code of conduct inherent to Option Three is, arguably, a sufficiently more robust model and, with little additional impost to Option Two to Government or practitioners, provides a more immediate and responsible mechanism for dealing with breaches of professional and ethical standards in care. Intervention by Government is kept to a minimum; however there is an accountable and transparent process around what the regulatory response by way of sanction would actually be and the circumstances in which they would be applied.

Option Three provides pronounced benefits of national consistency to providers and consumers, whilst still empowering individual professional associations to set standards for professional admission. Furthermore, the establishment of a nationally accessible complaints register will stop rogue operators forum-shopping between associations or jurisdictions when a complaint has been made against them. This further assists the Government and broader community, in that the enforcement measures are autonomous of any professional association and wholly transparent.

ATMS believe that the extra costs associated with Option Three are primarily the maintenance of a national register and the routine business of Government in enforcing Codes it has auspiced. Coupled with the use of existing resources around compliance and enforcement in partnership with the relevant State and Territories, ATMS envisages the cost profile would be quite low and provide lasting community confidence in dealing with all health care practices, whether they be natural or medical.

If you are a practitioner, can you advise of what additional costs you think you would incur with the introduction of a statutory Code? Are there are some aspects of a statutory Code that are likely to be more costly than others.

ATMS is a professional association rather than a practitioner, but strongly believes that there would be negligible cost pressures to the practitioner. Especially, if done properly, the resources of Government in promoting the Code and its enforcement would obviate the need for practitioners advocating its existence. In practice, this may take the form of certain campaign collateral being produced and disseminated to practitioners by the Commonwealth for display in their offices and distribution to clients.

Extent to Which National Uniformity Is Desirable (Section 6.3.1)

Do you think there should be a nationally uniform Code of conduct for unregistered health practitioners or are different Codes in each State and Territory acceptable?

For consistency as well as public and practitioner certainty, ATMS is strongly of the view that a nationally uniform Code is required. Furthermore, it is very difficult for a nationally transparent complaints register to work if there is not one nationally consistent Code underpinning it. ATMS also believes that unless this is a nationally consistent form of regulation, the community will not be fully protected from rogue operators who could simply change jurisdictions and continue unsafe business practices with no transparency to the community.

Should there be nationally uniform or nationally consistent arrangements for investigating breaches of the Code and issuing of prohibition orders, or should States and Territories each implement their own arrangements?

ATMS believes that, notwithstanding the Code should be a Commonwealth instrument, in the interests of efficiency and streamlined application of these regulations, States and Territories should empower their existing arms of government policy to enforce the regulatory regime.

Should there be a centralised administrative body that administers the regulatory scheme, or should it be administered by each State and Territory government?

ATMS believe that a national body should oversee the scheme and maintain the suggested national complaints register.

Scope of Scheme (Section 6.3.2)

If a statutory Code of conduct were to be enacted, to whom should it apply?

ATMS believe that all who are broadly defined as health service practitioners, whether this is by community understanding or self-identification, and who are not covered by an existing scheme should be included in this process.

ATMS believes that the key principle of regulation in this field is to provide confidence to consumers and indeed protection from rogue practitioners whom through their self-styled claim to legitimacy may cause actual harm and irreparably damage consumer confidence.

Which practitioners, professions or occupations should be included?

As above, ATMS believes that all who are broadly defined as health service practitioners and are not covered through existing schemes should be included in this process. Bluntly, if the claim or implication is that through the provision of the service a practitioner, profession or occupation will improve individual's health, they should be included.

Should it apply only to practitioners who deliver health services? If so, what should be the definition of a health service?

As above, ATMS believes that if the implication or claim of the provider is that they are servicing a health need of a patient or client, then they should be subject to the regime. In broad terms, ATMS believes that "health service" could be defined almost by exception i.e. if not explicitly covered by an existing scheme, and provide a service as latterly defined, then they are a health service provider. That individual should then be free to determine which professional association they feel their modality best fits within and affiliate themselves accordingly. Certainly, given the amorphous collection of modalities just within ATMS membership let alone the broader gamut of current unregistered practitioners, it would likely be unfeasible for Government to appropriately and with certainty define practice schemes.

Should it apply to registered practitioners who provide health services that are unrelated to their registration, for example, a registered nurse who is working as a naturopath or massage therapist?

ATMS believes that, unless statutory registration does not first apply, then such practitioners should be covered under AHMAC's proposed options. The risk is that such omissions or exemptions could be created through quite semantic job descriptions (e.g. the registered nurse providing massage therapy) and thus a weakness to community confidence or worse a loophole which could be exploited. Ideally, ATMS believes that all medical practitioners should have an accreditation through an appropriate professional association and an appropriate regulatory oversight.

Should it only apply to practitioners who directly deliver services, or should it also apply to those who deliver health services through the agency of another person, for example, the owners or operators of businesses that provide health services?

Similarly to the above point, ATMS believes that if a consistent, national regime is enacted, it should apply to all practitioners. As to the owners of either freehold or businesses where such services are provided, they should have similar responsibilities placed upon them in addition to those already enshrined in existing forms of legislation and jurisdiction.

Administrative Arrangements (Section 6.3.3)

Do you have a preferred option for the legislative and administrative arrangements through which a Code of conduct for unregistered health practitioners is administered and complaints about breaches of the Code are investigated and prosecuted?

ATMS believes that, in as far as is possible, the path of least resistance to enacting legislation for this proposal is either amendments to the Health Practitioner Regulation National Law Act or a supplementary piece of legislation in the same spirit.

What are your reasons?

ATMS believe that the probity checking empowered by the existing National Law is advantageous in this matter both to Government in ensuring that practitioners are fit and proper persons; to professional associations from as trite a matter as brand protection through to the integrity of professional standards accreditation and most importantly to the community through its transparency, uniformity and practical approach. Such subtle regulatory approaches are, to ATMS' view, indicative of best practice: Government is an active player in the marketplace, whilst not prescribing professional or clinical approaches beyond sensible levels.

Most importantly, however, aside from the drafting and passage of certain Bills, all practical resources already exist within the State and Territory jurisdictions in one way or another. Moreover, such an approach does not impinge on any State or Territory jurisdictional issues and is a tested and, importantly, accepted model in the community.

Content of a National Code of Conduct (Section 6.3.4)

What do you think should be included in a national statutory Code of conduct?

ATMS endorses the NSW model, however would strongly desire to see the outlined probity checking function incorporated at a national level. ATMS believes this is a logical addition to the model and provides far greater degrees of certainty to the community.

Do you have any comments on the NSW Code of Conduct for Unregistered Health Practitioners?

As above, ATMS endorses the NSW Code of Conduct but would like to see the addition of a probity checking function.

What do you think are the strengths and weaknesses of the NSW Code?

ATMS do not believe that the NSW model makes sufficient steps to provide adequate probity checking of practitioners; however the breadth of the Code perhaps explains this. Indeed, ATMS believe the clear breadth of the Code does act as a strength for the community, practitioners and, presumably, is of comfort to Government.

Do you think it provides a good model? What are your reasons?

As indicated throughout this subsection, yes, ATMS believes this to be a good model for reasons of its clarity and breadth.

Prosecutions and Hearings (Section 6.3.5)

Do you have a preferred option for the mechanism through which prohibition orders should be issued, that is, via an administrative order decided by a Commissioner, or via a tribunal or court hearing?

ATMS favours an administrative order process through which the sanction of a prohibition order should be imposed.

What are your reasons?

ATMS believes that the transparent processes around an administrative order and the less formalised and costly measures of a court hearing provide an efficient mechanism to deal with such matters as they arise. Moreover, ATMS has confidence that procedural fairness and matters of due process will naturally be developed and incorporated as part of the enabling of such a scheme.

Grounds for Issuing a Prohibition Order (Section 6.3.6)

What 'relevant offences' (if any) should provide grounds for a prohibition order to be issued?

ATMS believes the methodology outlined in the NSW code for determining a relevant offence is thematically on the right track; however this may need to be refined for the purposes of establishing a National Code with enforcement devolved to the States and Territories.

What other grounds should apply before a prohibition order may be issued?

It may be appropriate to issue a prohibition order more pre-emptively, subject to principles of procedural fairness and due process, should a practitioner be disqualified or suspended from their nominated professional association as a result of a disciplinary finding by that association. Administratively, this would be flagged in a probity check and provide a safety oversight to the Code for practitioners.

Financing Of Scheme (Section 6.3.7)

How do you think a regulatory scheme to investigate and prosecute breaches of a national statutory Code of conduct for unregistered health practitioners should be funded?

ATMS believes that, if implemented in the spirit of this proposal, Government could reduce both its financial and technical exposures in this area through partnering with professional associations. The joint responsibility and the sharing of costs provides a win-win-win to the government, the integrity of the diffuse professions currently unregulated and the community who can have confidence in their entire health care system's practice base derived from the trust in government processes and regulation.

What are your reasons?

A joint responsibility and shared cost arrangement harnesses the best of both worlds: the profession remains responsible for auspicing the National Code within the industry and driving compliance as a precondition of accreditation and membership. Furthermore, the profession can initially retain responsibility for administering minor matters of practice across modalities whilst referring on serious concerns. Likewise, the Government will be responsible for investigating and responding to serious matters relating to the National Register which in turn will drive the continual professional development of practitioners and professional associations.

Any other comments

Probity verifications, checks and balances must be introduced to ensure any Professional Association is bona fide and effective. This topic needs more consultation and consideration. However measures such as an application process whereby an Association must apply and provide specified supporting documentation which is then assessed against objective and professionally agreed criteria would broadly seem suitable as an initial measure. Additional reviews or audits would be open, perhaps triggered by factors such as justified complaints against an Association's members and or a random process.

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Are you a professional association: ATMS is a professional association.

Would you like to be informed of the outcome of the consultation? **Yes**